

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-737254-D3
AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Stacy James McDERMOTT

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1772

Stacy James McDERMOTT

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 4 December 1968, at Long Beach, Cal., an Examiner of the United States Coast after a hearing held at Portland, Oregon, suspended Appellant's documents for one month plus three months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a fireman/watertender on board SS W. H. PEABODY under authority of the document above captioned, Appellant:

(1) on or about 7 September 1968, at Cam Ranh Bay, RVN, wrongfully failed to perform duties, and

(2) on or about 17 September 1968, at Da Nang, RVN, wrongfully failed to perform duties.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of guilty to the charge and first specification, but not guilty to the second.

The Investigating Officer introduced in evidence voyage records of W. H. PEABODY.

In defense, Appellant offered in evidence the testimony of the vessel's deck engineer.

The Examiner called as witness the vessel's third assistant engineer, Mr. Milton.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of one month plus three months on twelve months' probation.

The entire decision was served on 10 December 1968. Appeal had been timely filed on 15 November 1968. Appeal was perfected on 24 February 1969.

FINDINGS OF FACT

On both dates in question, Appellant was serving as a fireman/watertender on board SS W. H. PEABODY and acting under authority of his document.

On 7 September 1968, Appellant wrongfully failed to appear for his watch when the vessel was at Cam Rahn Bay, RVN.

On 17 September 1968, at Da Nang, RVN, Appellant reported for his watch (1600-2400) in an intoxicated condition. The engineer of the watch, the third assistant, ordered Appellant to leave the duty area. Appellant did so.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

- (1) Appellant was found to have committed an act of misconduct with which he was not charged, and
- (2) There was insufficient evidence to establish that Appellant was intoxicated.

APPEARANCE: Vance, Davies, Roberts & Bettis, Seattle, Wash., by Denny Anderson, Esq.

OPINION

I

Appellant argues that there was a fatal variance between what was alleged in the second specification and what the Examiner found proved. While the specification alleged a failure to perform duties, the Examiner found that intoxication was the cause of the failure to perform.

There is no dispute as to the fact that Appellant did not stand his watch from 1600 to 2400 on 17 September 1968. Appellant's position, at the hearing and on appeal, was that he was relieved of his duty to stand the watch by order of the third assistant, who was engineer of the watch. There is also no dispute as to the fact that Appellant was ordered out of the duty area.

Of the essence then is the reason why the order was given. If Appellant were intoxicated, he was the cause of his failure to stand the watch and he would have failed to perform a duty. There was evidence tending to prove intoxication. No other reason is asserted.

The issue is simple. If it is found that Appellant was intoxicated his failure to stand the watch was his own fault; he failed to perform a duty. If, on the other hand, intoxication is not proved, the

situation is that Appellant was relieved of his duty and his failure to stand the watch was not wrongful.

The Examiner found that Appellant was intoxicated and that his condition caused his being ordered from the duty area. These findings support the specification. There is no variance. Appellant was not found to have committed an act of misconduct with which he was not charged.

II

Appellant, however, also attacks the evidence as insufficient to support a finding of intoxication. He cites many legally approved tests for ascertainment of intoxication. While he admits that some of these tests are not available aboard ship, he asserts that the tests used were inadequate.

On this issue, Appellant produced a witness, the deck engineer, to whom Appellant spoke shortly after he had been ordered off watch. This witness testified that Appellant did not look intoxicated to him, but also that "he may have had a hangover from the night before." The witness also testified that he did not know whether Appellant had recently been drinking, but that if he had it must have been in his room. R-13.

As to the recency of drinking before he reported to work Appellant had said, "When that happened I had a couple of drinks but I was sober..." R-11.

The third assistant testified that Appellant stumbled and had the odor of liquor on his breath. On his experience of many watches stood with Appellant he formed the opinion that Appellant was intoxicated and ordered him off watch because he thought it would be unsafe to allow Appellant to work. (On the matter of stumbling, although Appellant did not testify he made statement that because of a paralytic condition " as I hit the floor plates [on the occasion in question] I might weave a little bit..." R-11).

While arguing the inadequacy of the evidence of intoxication, Appellant states:

"The testimony of Mr. Milton was to the affect that although appellant reported for duty it was his opinion that he was intoxicated, and that he ordered the appellant to leave the engine room (TR.20). The only thing resembling objective evidence to which Mr. Milton was able to testify in support of his opinion was the fact that he detected an odor of alcohol on McDermott's breath (TR.20)and that he observed McDermott stumble as he came down to the bottom of the ladder going into the engine room (TR.21)."

Observation of gait and other physical movements and smelling of breath are recognized bases for forming an opinion of sobriety of another. The opinion of the third assistant was buttressed by his familiarity with Appellant's work.

The Examiner was therefore faced with two opinions, one that Appellant was intoxicated, the other that he was not. If it be assumed that the opinions were of equal probative value the trier of facts may base his finding upon either, as long as the evidence which leads him to find the allegation proved is substantial. The evidence in this case was substantial and supports the findings.

In further support of the Examiner's action, if such support were needed, is the fact that the witness who gave the opinion that Appellant was not at the time intoxicated, although he might have had a "hangover" at 1600 from the night before, could not give an opinion as to whether Appellant had recently been drinking.

Not only did Appellant admit at the hearing that he had had a couple of drinks, but it is stated in the appellate brief, "He candidly admitted that he had previously had a couple of drinks..."

It is clear that the Examiner did not err in giving less weight to the opinion of a witness who did not detect what Appellant himself freely admits, that he had at the time been drinking.

ORDER

The The order of the Examiner dated at Long Beach, Cal., on 4 December 1968, is AFFIRMED.

W.J. SMITH
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 26 day of Jun 1969.

Charges and Specifications

No variance with findings when FTP charged and FTP due to intoxication found

Failure to perform duties

Intoxication as cause

Intoxication, ordered off watch

Findings of Fact

Based on substantial evidence

May be based on either of conflicting opinions of equal probative value

Must be based on substantive evidence

No variance with specification when FTP charged and FTP due to intoxication found

Intoxication

Adequacy of testimony

Admission of drinking as affecting testimony

Conflicting opinions as to

Failure to perform duties due to

Offenses resulting from

Substantial evidence of

Testimony

Conflicting testimony re party's intoxication

Conflicting, to be weighed by Examiner

Witnesses

Conflicting testimony re party's intoxication

Conflicting testimony resolved by Examiner